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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 263

WAYNE K. PATTERSON, Warden of the Colorado State Reformatory, and HARRY C. TINSLEY, Warden of the Colorado State Penitentiary,
Petitioners,

vs.

ELLSWORTH MEDBERRY, Respondent.

PETITION FOR REHEARING

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COMES NOW Duke W. Dunbar, Attorney General of the State of Colorado, and shows unto this Court:

1. That on October 9, 1961, this Court denied the State of Colorado's petition for certiorari in *Patterson, et al. v. Medberry*, No. 263, October Term, 1961. On the same date, Mr. Justice Harlan filed a memorandum relative to the case.

2. That the memorandum first points out that two important issues are involved in the case. The first is

relative to a federal district court's entitlement to re-examine a state court's finding on indigency which it was said was ripe for consideration. The second involves the necessity of a retroactive application of the *Griffin* rule in circumstances where the state, without fault on its part, is presently unable to supply petitioner with a trial transcript or otherwise to satisfy the *Griffin* rule. Mr. Justice Harlan, after assuming that the lower court was correct in its finding that the state was now unable to provide a transcript, went on to note that the denial of certiorari "will not of course preclude the state from showing below, if it can, that without fault on its part it is now unable to afford petitioner other adequate means of appeal and from further recourse to this court, if necessary, with respect to either or both of the above questions."

3. That we are somewhat at a loss to know how the state here, under the authority of *Brown v. Allen*, 344 U. S. 443, would again have access to a lower federal court for the purpose of showing that without fault on its part it is now unable to afford the prisoner other adequate means of appeal.

4. That the State of Colorado is here seeking certiorari of a United States Circuit Court of Appeals decision, 290 F. (2d) 275, which affirmed a United States District Court judgment based upon a memorandum opinion and order which contained the following language:

> "After conviction a motion for new trial was filed alleging thirty-five grounds of error. An examination of the motion for new trial shows that approximately twenty-five of the grounds would *require a transcript of the evidence* for full consideration. The motion for new trial raised questions of the sufficiency of the

evidence, whether there was evidence justifying the giving of certain instructions, whether errors in the admission or exclusion of evidence occurred and whether there was newly discovered evidence justifying a new trial. The conclusion that *a transcript was necessary* is supported by the original trial judge * * *.

"The respondent urges that petitioner should have set out here the specific errors which were allegedly committed in the original trial. There is nothing in the Griffin or Eskridge cases that indicates that one is precluded from relief if one cannot remember the details of trial error after twenty years. Petitioner's allegation that 'considerable errors were committed at the trial' * * * is sufficient * * *. *With a transcript available* petitioner could pin-point the alleged errors.

"The Court, therefore, finds that because of lack of a transcript, Medberry was not accorded an adequate appellate review * * *." (Emphasis supplied)

Medberry v. Patterson, 188 F. Supp. 557, 564.

5. That since the above language is contained in the opinion of the District Court to support the judgment, the affirmance of which we now seek to have reviewed in this court by certiorari, and since such language clearly indicates a finding to the effect that nothing short of a complete transcript could be considered a sufficient basis on which to expect the prisoner to acquire an adequate appellate review, we respectfully submit that it would be a vain and useless thing to now attempt to make a showing to that very same court to the effect that the prisoner can obtain a proper writ of error based on something other than the complete reporter's transcript.

6. That it is to be noted that to our knowledge the best notes of the trial and account of the proceedings therein, other than the official reporter's notes, were kept by newspaper reporters who daily attended the trial and wrote up their notes in the form of press releases. These would appear to be a somewhat accurate record of the trial, but the opinion on which was based the judgment which we have sought to have reversed in the United States Circuit Court of Appeals and in this Court stated that the appeal which the prisoner already has had, based upon those newspaper accounts, was an adequate appellate review on only those points which required no reporter's transcript to consider. That opinion, as can be seen from the quotation above, also says, in effect, that the prisoner does not have to now submit assignments of error or other list of alleged errors in order to assist the state to better reconstruct, without a reporter's transcript, the parts of the trial that the prisoner might now wish to have reviewed in a new and adequate appeal of the many points inadequately considered in the original appeal.

WHEREFORE, it is respectfully submitted that the only lower federal court to which the State of Colorado could go to make the showing referred to in Mr. Justice Harlan's memorandum has already decided that the only alternative materials here available are not a sufficient basis for an adequate appellate review, and that only a complete transcript could here afford the prisoner the complete appellate review to which he is entitled. (Any indication to the contrary apparently listed in the conditional release order must be considered an unreal and unworkable alternative).

It is hereby certified that this petition for rehearing is presented in good faith and not for delay and is restricted

to the grounds above specified. It is further requested that, in view of the fact that the six months period during which Colorado must act upon one of the alternatives, such as a retrial (if it is to avoid releasing this man under the present decision of the Tenth Circuit Court of Appeals), expires December 8, 1961, that this Court now extend such time period to a date ninety days subsequent to its determination regarding this petition for rehearing in order to provide adequate time to attempt a retrial in the Colorado courts or to obtain final determination by this Court on certiorari.

Respectfully submitted,

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Attorney General.

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